85-2136

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CITY CAB COMPANY OF ORLANDO, INC., and
YELLOW CAB COMPANY OF ORLANDO, INC.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eleventh Circuit improperly accepted appellate counsel's post-hoc rationalization for the National Labor Relations Board's Decision and Order, when it enforced the Decision and Order.

2. Whether the United States Court of Appeals for the Eleventh Circuit improperly construed the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, and this Court's decision in *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959), when it enforced a Decision and Order of the National Labor Relations Board, despite the absence of a timely unfair labor practice charge to support the allegations contained in the complaint, as required by Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b).

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of The Supreme Court, Counsel for Petitioners certify that the following is a complete listing of all parties to the proceedings below, along with a listing of affiliates of Petitioners and Respondents:

1. All parties listed in the caption of this petition.
2. Yellow, City, Dixie Independent Cab Drivers Association.
3. Service Employees International Union, Local 750.
4. Yellow Cab Company of Orlando, Inc. d/b/a Dixie Cab Co.
5. Yellow Cab Company of Orlando, Inc. d/b/a Yellow Cab Special Services
6. Yellow Cab Company of Orlando, Inc. d/b/a Yellow Cab of Winter Park
7. Yellow Cab Company of Orlando, Inc. d/b/a Checker Cab Co.
8. Airport Limousine Service of Orlando, Inc.
9. Mears Motor Livery Corporation
10. Jack Rabbit Courier Service of Orlando, Inc.

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IN THE

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No. ————

CITY CAB COMPANY OF ORLANDO, INC., and
YELLOW CAB COMPANY OF ORLANDO, INC.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners City Cab Company of Orlando, Inc. and Yellow Cab Company of Orlando, Inc., pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this matter on April 28, 1986.

OPINION BELOW

The Decision of the United States Court of Appeals for the Eleventh Circuit (App. 1a-18a), and the Decision and Order of The National Labor Relations Board (App. 19a-50a), including the decision of the National Labor Relations Board's Administrative Law Judge, are reproduced in the Appendix.

JURISDICTION

In *City Cab Company of Orlando, Inc. et al. v. NLRB*, 787 F.2d 1475 (11th Cir. April 28, 1986), the United States Court of Appeals for the Eleventh Circuit has decided an important question concerning the proper administration of the National Labor Relations Act, 29 U.S.C. § 151 et seq., in a manner in conflict with applicable decisions of this Court. The jurisdiction of this Court is sought pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION AT ISSUE

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b):

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the service of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon."

STATEMENT OF THE CASE

The United States Court of Appeals for the Eleventh Circuit has held that Petitioners City Cab Company of Orlando, Inc. and Yellow Cab Company of Orlando, Inc. ("Petitioners") violated Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5) ("the Act") by unilaterally changing the terms and conditions of taxicab driver employment. Petitioners contend that the National Labor Relations Board's ("the Board") complaint against Petitioners alleging unlawful conduct should have been time-barred by the limitations period in Section 10(b) of the Act, 29 U.S.C. § 160(b).

BACKGROUND

This dispute originated in January 1977 when the Yellow, City, Dixie Independent Cab Drivers Association ("the Association") filed a petition with the Board seeking to represent Petitioners' taxicab drivers. In the subsequent Board unit hearing, Petitioners asserted that many of their drivers should be excluded from the eligible voting unit because of their independent contractor status. The hearing officer rejected these arguments and held that Petitioners' drivers were employees. The Board affirmed the hearing officer's unit decision. 232 NLRB 105 (1977). Thereafter, an election was conducted, which resulted in a victory for the Association. On October 26, 1977, the Board certified the Association as the exclusive bargaining representative for Petitioners' taxicab drivers.

Petitioners sought review of the Board's determination by refusing to bargain with the Association. A complaint issued, and on May 9, 1979, the Board found that Petitioners' refusal to bargain violated Section 8(a)(5) of the Act. 242 NLRB 94 (1979).

Petitioners sought review of the Board's decision by the United States Court of Appeals for the District of

Columbia Circuit ("D.C. Circuit"). At the time of the petition, every federal appellate court which had reviewed the issue had held that taxicab drivers, with working relationships similar to those conditions enjoyed by Petitioners' drivers, were independent contractors. During the pendency of the petition for review, Petitioners continued to operate their business in accordance with established procedures and business necessity. In particular, Petitioners continued to make adjustments in taxicab lease rates.[1]

On July 3, 1979, the Association filed an unfair labor practice charge against Petitioners. The charge alleged that Petitioners had violated Sections 8(a)(1) and (5) by making unilateral changes in taxicab lease rates. Board Region 12 issued a complaint alleging six unlawful, unilateral changes based upon these allegations.

On August 30, 1979, the parties executed a stipulation which resolved all matters in dispute. The stipulation provided for a resolution of the charges based upon the D.C. Circuit's decision on review. If Petitioners' appeal was successful, the parties agreed that the complaint would be dismissed. If, however, the D.C. Circuit affirmed the Board's bargaining order, the stipulation required Petitioners to post a standard Board notice and remedy "the violations alleged in the instant case" by immediately abiding by the terms of [a standard Board] settlement agreement.

The D.C. Circuit affirmed the Board's order on July 30, 1980. *City Cab Co. of Orlando, Inc., et al. v. NLRB*, 628 F.2d 261 (D.C. Cir. 1980). Thereafter, the parties initiated collective bargaining and began discussions in an attempt to effectuate the August 1979 settlement. Petitioners posted the notice required by the settlement, but

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[1] Petitioners lease taxicabs to their drivers for a flat daily or weekly lease rate. Drivers retain all fares collected from passengers.

the parties were unable to reach agreement upon the amount of backpay, if any, due the drivers.

During the period between September 1979 and January 1981, Petitioners continued to make periodic changes in the rates charged to drivers for the lease of their taxicabs. These changes had for many years been, and continued to be, a part of the existing business operation. Prior to each change, the drivers were notified that a change was forthcoming. The Association did not request bargaining over these changes, and at no time were any of these changes challenged by a timely unfair labor practice charge. Suddenly, however, on July 20, 1981, the Association filed an unfair labor practice charge complaining that Petitioners instituted an unlawful, unilateral lease rate change on July 13, 1981.

On August 26, 1982, Board Region 12 Regional Director Harold Boire set aside the settlement. The Regional Director contended that the settlement "had failed in its purpose and because of allegations of post-settlement violations of the Act." Several days later, the Regional Director issued a consolidated complaint, based upon (1) the violations alleged in the July 1979 charge, (2) alleged violations which occurred between September 1979 and January 1981, and (3) the alleged violation which occurred in July 1981. While the original July 1979 allegations and the allegedly unlawful July 1981 conduct were clearly the subjects of timely unfair labor practice charges, it was equally clear that *no unfair labor practice charge was filed within six months of the alleged unlawful changes which occurred between September 1979 and January 1981.* Indeed, the Regional Director did not provide Petitioners with notice that their September 1979-January 1981 conduct was being challenged until he issued the consolidated complaint in September 1982, nearly three years after the fact.

Proceedings Before The Administrative Law Judge

Petitioners asserted a number of defenses to the consolidated complaint. They argued that the Board lacked jurisdiction to reach the alleged violations occurring between September 1979 and January 1981, because a timely unfair labor practice charge had not been filed. Petitioners also argued that the Region had improperly withdrawn the settlement. They asserted, *inter alia*, that withdrawal was improper, because there had been no post-settlement violations of the settlement. Petitioners denied that their periodic rate adjustments had been unlawful. Petitioners asserted that these changes were consistent with past practice and were compelled by business necessities created by forces outside Petitioners' control.

The Administrative Law Judge ("ALJ") rejected these arguments and concluded Petitioners had made unlawful, unilateral changes. In response to Petitioners' argument that most of the allegations were time-barred, the ALJ stated:

> Respondent presents an elaborate argument to the effect that the Complaint is defective because it is not based upon a charge filed within six months of the alleged unfair labor practices, and is therefore contrary to the mandate of Section 10(b) of the Act. However, this argument is expressly linked by Respondent to its contention that the settlement agreement was improperly set aside—an argument I have rejected. The complaint herein was clearly warranted on the basis of the two charges which were filed, under applicable law.

(App. 40a) Contrary to the ALJ's statement, however, Petitioners had not linked their timeliness defense to the alleged, improper settlement withdrawal. Moreover, the ALJ failed to cite any case law, or provide a rationale, supporting his finding that none of the allegations were time-barred. He ignored Petitioners' timeliness defense

and held that the Regional Director's withdrawal of the settlement permitted the Board to reopen the original case and sweep all subsequent matters into one combined proceeding, without regard to Section 10(b).

Proceedings Before The National Labor Relations Board

Petitioners filed exceptions to the ALJ's decision, arguing that the absence of a timely unfair labor practice charge rendered the complaint defective. Petitioners objected to the ALJ's approval of the settlement withdrawal. Petitioners also objected to the ALJ's refusal to accept, or even consider, their argument that the consolidated complaint was faulty *even if* the Regional Director's withdrawal of the settlement was proper. Additional exceptions were filed challenging the ALJ's finding that Petitioners' periodic rate adjustments constituted unlawful, unilateral changes.

The Board affirmed and adopted the ALJ's rulings, finding and conclusions in a two-page, pro forma Decision and Order. 273 NLRB No. 131 (January 9, 1985). The Board's discussion of the issues was limited to a footnote:

> . . . the judge states that the Respondent's argument that the complaint is defective because not based on timely filed charges is "expressly linked" by the Respondent to its argument that the settlement agreement was improperly set aside by the Regional Director. However, in the posthearing brief to the judge, and again in its brief in support of its exceptions, the Respondent did assert, as an alternative argument, that even if the settlement agreement had been properly set aside, the Complaint would still be barred by section 10(b). We reject the Respondent's arguments in this regard. In affirming the judge's finding that the settlement agreement was properly set aside, we find it unnecessary to address the issue of whether the Complaint would have been barred by Sec. 10(b) if the settlement agreement had *not* been properly set aside. [cite (emphasis in original)].

(App. 20a) Like the ALJ, the Board failed to cite case law or articulate any specific rationale for its conclusion that none of the complaint allegations were time-barred.

Proceeding Before The United States Court of Appeals For The Eleventh Circuit

Petitioners filed for review of the Board's Decision and Order in the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") pursuant to 29 U.S.C. § 160(f). Petitioners challenged the Board's decision that the withdrawal of the settlement permitted a waiver of Section 10(b) and eliminated the need to file timely charges to prosecute allegations unsupported by an unfair labor practice charge. Petitioners argued that this premise was contrary to the mandatory provisions of Section 10(b), relevant case law, the Board's internal procedures and common sense. Additionally, Petitioners challenged the Board's inexplicable failure to consider, discuss or refute its carefully drawn Section 10(b) arguments, or even to explain its adoption of the ALJ's decision.

The Eleventh Circuit enforced the Board's order on April 28, 1986. 787 F.2d 1475 (11th Cir. 1986). The Eleventh Circuit rejected Petitioners' argument that the majority of the allegations were barred by Section 10(b). In so doing, the court accepted Board appellate counsel's argument that this case is controlled by *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959). The Eleventh Circuit construed *Fant Milling* to permit the prosecution of post-July 1979 conduct regardless of the lapse of time between the post-July 1979 conduct and either a new charge, an amended complaint, or some other notice of alleged violations. The Eleventh Circuit effectively held that the Section 10(b) limitations period is rendered inapplicable by *Fant Milling*.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's reliance upon *Fant Milling* is an improper, post-hoc rationalization for the agency's action. Neither the Board nor the ALJ invoked *Fant Milling* or its rationale in dismissing Petitioners' Section 10(b) arguments. Assuming, however, that reliance upon *Fant Milling* was proper, the Eleventh Circuit misinterpreted *Fant Milling* and improperly eliminated the protections of Section 10(b). The far reaching implications of the Eleventh Circuit's decision warrants this Court's review.

I. The Eleventh Circuit Improperly Accepted Appellate Counsel's Post-Hoc Rationalization for the Decision of the National Labor Relations Board.

It is axiomatic that "courts may not accept appellate counsel's post-hoc rationalizations for agency action." *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 444 (1965). *See also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-67 (1962); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). As the Court noted in *Burlington Truck Lines*,

> *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself:
>
> > A simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the Court is powerless to affirm the administrative action . . . .

371 U.S. at 168-69 (citing *Chenery, supra*, 332 U.S. at 196).

The Eleventh Circuit relied principally upon *Fant Milling* to support the Board's determination that the com-

plaint allegations concerning September 1979-January 1981 conduct were not time-barred. In *Fant Milling*, this Court found that a complaint can include allegations of post-charge violations of the Act, as long as the post-charge conduct is related to, or grows out of, conduct which is the subject of a timely charge pending before the Board. Significantly, however, neither the Board nor the ALJ in this case cited *Fant Milling* or made reference to its general principles. The Eleventh Circuit embraced *Fant Milling* only after the Board's appellate counsel presented the case as a possible explanation and justification for the agency's action.

The Eleventh Circuit's justification for its belated adoption of *Fant Milling* is disingenuous, at best. Contrary to the assertion of the court, a plain reading of the ALJ's decision demonstrates that he did not present any "statement of the law" concerning Section 10(b). (App. 17a) In fact, the ALJ expressly declined to reach Petitioner's timeliness defense and arrived at his result through a tortured construction of the effect of the settlement agreement. The Board then merely issued a pro forma decision in which the sum total of its reasoning and authority consisted of the conclusory statement, "we reject [Petitioners] arguments in this regard." (App. 20a) *Fant Milling* did not appear in the decisional body of this dispute until the Eleventh Circuit seized upon appellate counsel's post-hoc explanation long after the agency made its decision.

It is hard to conceive of a more obvious or egregious example of post-hoc rationalization. The ALJ confused and ultimately declined to address Petitioners' timeliness defense. The Board merely "rejected" Petitioners arguments without explanation. Then, in a decision intended to shore up the otherwise-indefensible basis for agency action, the Eleventh Circuit belatedly supplied a rationale for a result which was (1) decided by the ALJ on a different basis and (2) affirmed by the Board through

the vaguest language possible. The Board should not be permitted to achieve enforcement of its decisions merely by claiming to have "considered" and "rejected" arguments under some amorphous, unstated "applicable law" which is to be supplied later by a reviewing court. It is precisely these types of result-oriented, post-hoc rationalizations that this Court has repeatedly rejected. The Eleventh Circuit's decision should therefore be reversed.

II. The Eleventh Circuit Misinterpreted *NLRB v. Fant Milling Co.* in Enforcing The Board's Decision and Order.

The Eleventh Circuit should have held that most of the allegations contained in the September 1, 1982 consolidated complaint were time-barred. Section 10(b) states that "no complaint shall be issued based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . ." Section 10(b) was enacted to provide notice of potential disputes, to prevent the assertion of stale claims and to stabilize existing bargaining relationships. *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 424 (1968); *International Association of Machinists v. NLRB*, 362 U.S. 411, 419 (1960). The promotion of these goals is so important that Congress intended Section 10(b) to bar the Board from dealing with past conduct after the six month period has run, "even at the expense of the vindication of statutory rights." *International Association of Machinists*, 362 U.S. at 429.

The Eleventh Circuit found that the Board's "Section 10(b) problem" was cured because, under *Fant Milling*, the July 1979 unfair labor practice charge permitted prosecution of alleged violations occurring from May 1979-January 1981. In doing so, the Eleventh Circuit misstated and overstepped the bounds of *Fant Milling*. *Fant Milling* emphasized that the Board's power to reach post-charge conduct is limited. The Board does not have "carte blanche" authority to expand the charge as it may

please. *Fant Milling*, 360 U.S. at 309. *Fant Milling* does not and should not permit Board jurisdiction over conduct occurring more than six months before the filing of a charge or other notice sufficient to satisfy Section 10(b). A careful review of *Fant Milling* demonstrates that post-charge allegations can be included in an ongoing prosecution, but only if the accused party is provided with notice of additional allegations as contemplated by Section 10(b). Section 10(b)'s notice requirement is, or should be, an integral part of the *Fant Milling* decision.

In *Fant Milling*, the Board issued a consolidated complaint based upon both the allegations in the initial charge and the post-charge violations, but issued that complaint *less than four months after* the alleged post-charge violations. As a result, the consolidated complaint in *Fant Milling* provided timely notice as to the post-charge violations, and was well within the Section 10(b) period. The charging party in *Fant Milling* could have filed a timely, separate charge to support the complaint against conduct occurring after the initial charge.

In contrast, the alleged post-July 1979 violations in the instant case were *not* followed within six months by a timely new charge or by the issuance of a consolidated complaint within the Section 10(b) notice period. No charge was ever filed concerning the overwhelming majority of the post-July 1979 alleged violations. The Regional Director waited *almost 3 years* after learning that Petitioners had continued to make lease rate adjustments before providing Petitioners with notice that their conduct might be unlawful. Petitioners submit that this delay is not sanctioned by *Fant Milling*.

The Eleventh Circuit's unprecedented and improper expansion of *Fant Milling* is clearly inconsistent with Section 10(b) policy. Under the lower court's rationale, the Board can exercise jurisdiction over conduct without notice to the accused, as long as the alleged unlawful ac-

tivity occurred after a timely unfair labor practice charge. This boundless discretion permits the Board to avoid Section 10(b) requirements and allows the agency to reach otherwise stale claims five, ten or even fifty years later. The Court should reject this approach and reaffirm adequate notice and the elimination of stale claims as integral elements of federal labor law.

Assuming *arguendo* that *Fant Milling* permits Board jurisdiction over all post-charge conduct relating to unfair labor practice charges still "pending before the Board," this decision is necessarily inapplicable in "settlement" cases. Charges resolved by settlement agreement are no longer "pending before the Board." Settlement agreements create the expectation that all outstanding disputes have been resolved. Parties reasonably expect that all future conduct is subject to the prohibitions and protections of the Act. However, under the Eleventh Circuit's interpretation, these expectations are dashed. By withdrawing its approval of a settlement agreement, the Board can now effectively bootstrap stale claims onto an earlier charge which is once again "pending" before the Board. This permissive interpretation improperly eliminates Section 10(b) in a settlement context.

Consistent with its result-oriented approach, the lower court chose to brush aside the one case which should be dispositive in a settlement context.[2] Had the lower court

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[2] The Eleventh Circuit cited Globe Gear Co., 189 NLRB 422 (1971), *enforced*, 451 F.2d 1348 (6th Cir. 1971), in support of the proposition that *Fant Milling* was applicable in settlement cases. In *Globe Gear*, the Regional Director set aside a settlement agreement and issued a consolidated complaint which included the subjects of the original charge, as well as post-settlement conduct. However, in *Globe Gear*, the consolidated complaint was issued three months after the settlement, barely weeks after the post-settlement violations, and less than six months after the original violations and the first charge. As had been the case in *Fant Milling*, the consolidated complaint in *Globe Gear* was timely as to the pre- and post-settlement violations and was well within the

properly considered the Board's decision in *Inyo Lumber Co.*, 98 NLRB 984 (1952), it would have barred the complaint as violative of Section 10(b). In *Inyo Lumber*, the Board dismissed charges of post-settlement violations of the Act, because the charging party waited more than nine months after the occurrence of the settlement violations before filing its charge. The Board stated:

> . . . the union waited for more than nine months [to file its post-settlement charge], and nothing appears in the record to explain or mitigate that delay. After due consideration of the Board's policies discussed above, and mindful of the intent of Congress, in adding § 10(b) to the original Act, to discourage unreasonable delays in filing charges, we find that, under the circumstances presented here, the original charges should not have been reactivated or amended nor a complaint issued thereon. Accordingly, we shall dismiss the complaint in its entirety.

Id. at 986.

As *Inyo Lumber* indicates, Board precedent insists that timely charges be filed for post-settlement violations. The Eleventh Circuit attempted to circumvent *Inyo Lumber* by claiming that the *Inyo Lumber* Board merely exercised its "discretionary power." Petitioners submit that the notice policy behind Section 10(b) is not "discretionary" and cannot be ignored for the convenience of the agency. Even if the Board has only "discretionary" authority to dismiss untimely prosecutions, the Board must not be permitted to delay its challenge to Petitioners' openly conducted activity for three years. If the Eleventh

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Section 10(b) period. As with *Fant Milling*, the charging party in *Globe Gear* could have filed a timely, separate charge to support the complaint against the post-settlement violations, in lieu of amending and consolidating the original complaint. In contrast, the violations in the instant case were not followed within six months by either a timely new charge, the issuance of a consolidated complaint, or by any other form of notice.

Circuit's decision is affirmed, Petitioners will be severely and unduly penalized for relying on their statutory right to fair notice.

CONCLUSION

The United States Court of Appeals for the Eleventh Circuit improperly accepted appellate counsel's post-hoc rationalization for the Board's Decision and Order, misinterpreted this Court's decision in *Fant Milling* and improperly permitted the Board to ignore the requirements of Section 10(b).

For these reasons, a Writ of Certiorari should be granted.

Respectfully submitted,

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Date: June 27, 1986

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 85-3085

CITY CAB COMPANY OF ORLANDO, INC., YELLOW CAB COMPANY OF ORLANDO, INC., d/b/a YELLOW CAB COMPANY and DIXIE CAB COMPANY,
Petitioners, Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner.

April 28, 1986

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Before HILL, Circuit Judge, TUTTLE and HENDERSON *, Senior Circuit Judges.

HILL, Circuit Judge:

This case involves a petition for review and cross-application for enforcement of an order issued by the National Labor Relations Board (hereinafter "the Board") on January 9, 1984, against City Cab Company of Or-

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* See Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

lando, Inc., Yellow Cab Company of Orlando, Inc. d/b/a Yellow Cab Company and Diixe Cab Company (hereinafter referred to collectively as "City Cab").[1] Appellant seeks review of the Board's affirmance and adoption of an Administrative Law Judge's findings that the Regional Director for Region 12 of the Board appropriately set aside an informal settlement agreement and that appellant violated sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158 (the "Act") by unilaterally changing the terms and conditions of its employees' employment. Specifically, appellant claims that (1) the Board's determination that appellant's unilateral changes in rental rates of its cabs and in other terms and conditions of employment of its drivers constituted an unfair labor practice is not supported by substantial evidence; (2) the Board abused its discretion in setting aside a settlement agreement entered into between appellant and the employees' union; and (3) the Board abused its discretion in instituting formal proceedings against appellant based upon allegations of post-settlement unfair labor practices inasmuch as charges with respect to the overwhelming majority of these practices were time-barred.

FACTS

The following facts are relevant to the decision in this case. Appellant City Cab operates taxi service in and around Orlando, Florida. Most of City Cab's drivers lease their cabs from City Cab for a fixed daily rate. In January, 1977, Yellow, City, Dixie, Independent Cab Drivers Association [hereinafter "the Union"], an in-house labor organization formed by drivers for City Cab, filed a petition with the Board seeking to represent taxi

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[1] The ALJ determined that as these companies had common officers, directors, and management, shared offices and facilities, had a common labor policy, and held themselves out to the public as a single, integrated enterprise, they were a single employer for purposes of the National Labor Relations Act.

drivers under contract with appellant. The Board rejected City Cab's claim that the drivers were independent contractors and directed an election which the Union won. The Union and City Cab subsequently entered into an interim collective bargaining agreement. Following a 1978 United States Court of Appeals decision finding certain taxi drivers in Chicago to be independent contractors, City Cab withdrew its recognition of the Union. After the Union filed a refusal to bargain charge against City Cab, the Board reaffirmed its previous position and found appellant's refusal to bargain constituted a violation of the Act. City Cab then petitioned the United States Court of Appeals for the District of Columbia for review of the Board's decision.

On July 3, 1979 the Union filed an unfair labor practices charge against City Cab, alleging unlawful unilateral changes in the driver's wages and working conditions. On July 25, 1979 the Regional Director issued a complaint alleging six instances of unilateral changes in terms and conditions of the driver's employment. In August 1979, the parties entered into an informal settlement agreement consisting of three documents: a standard "settlement agreement" form, a "notice to employees," and a "stipulation." In the notice, City Cab agreed to make no unilateral changes with respect to wages, rates, and other matters and that it would if necessary make whole any employees who had suffered monetary loss as a result of any unilateral changes in terms and conditions of employment. The settlement agreement, set forth on one of the Board's standard forms, promised, among other things, to comply with all terms and provisions of the notice. The agreement also provided that City Cab would "make whole the employees named below by payment to each of them of the amount set opposite his or her name," and though none of the employees were named in the agreement a clause regarding back pay stated that "[b]ack pay shall be computed in accordance with established agency policy." The stipulation recog-

nized the pending Court of Appeals case on the independent contractor issue, and provided that if City Cab's appeal in the District of Columbia Circuit was successful, the complaint would be dismissed. However, if the D.C. Circuit affirmed the Board's position that the drivers were employees as defined in the Act, and thus within the purview of the protection afforded by the Act, then City Cab would carry out the provisions of the settlement agreement.

On July 3, 1980, the United States Court of Appeals for the District of Columbia rendered a decision affirming the Board's assertion of jurisdiction over appellant's drivers and enforced the bargaining order against the company. *City Cab Co. of Orlando, Inc., et al. v. N.L.R.B.*, 628 F.2d 261 (D.C.Cir.1980). The parties subsequently began discussions in an attempt to effectuate the August, 1979 settlement agreement but were unable to reach agreement as to the amount of back pay due the drivers. Thereafter City Cab instituted a series of changes, occurring between September, 1979 and July 1981, as to the daily cab rental rate and mileage surcharge to City Cab's drivers, changes which the Board would later determine were made without advance notice to the Union. On July 20, 1981 the Union filed a second unfair labor practices charge against City Cab concerning the reinstatement of a daily mileage surcharge on July 13, 1981. Meanwhile, City Cab and the Union continued negotiations regarding implementation of the August 1979 settlement. On August 26, 1982, the Regional Director set aside the settlement agreement because it "had failed in its purpose and because of allegations of post-settlement violations of the Act." Shortly thereafter, in September, 1982, the Director issued a consolidated complaint, based upon violations alleged in both the July 1979 and July 1981 complaint as well as violations alleged to have occurred between September 30, 1979 and the July 13, 1981 violation. The ALJ concluded that the alleged violations were unlawful unilateral changes in violation of the

Act and ordered City Cab to compensate its drivers for any loss of earnings they had suffered as a result of these changes.

City Cab filed exceptions to the ALJ's decision, complaining that the ALJ's finding that City Cab had made unlawful, unilateral changes was not supported by substantial evidence, that any claims regarding unfair labor practices were time-barred, and that the Board abused its discretion in setting aside the settlement agreement. The Board affirmed and adopted the ALJ's ruling, resulting in the instant appeal.

DISCUSSION

Whether City Cab's Changes in Cab Rental Rates and Other Working Conditions Violated the Act

Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their right to, among other things, organize and bargain collectively. Section 8(a)(5) of the Act requires that an employer bargain with the duly designated representative of its employees. Section 8(d) sets forth the parameters of this obligation, requiring that the parties "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder. . . ." In addition, employers may not impose new or different working conditions without first affording the employees' representative an opportunity to bargain over them. *A.H. Belo Corp. v. N.L.R.B.*, 411 F.2d 959, 970 (5th Cir. 1969), *cert. denied*, 396 U.S. 1007, 90 S.Ct. 561, 24 L.Ed. 2d 498. On the other hand, an employer may lawfully make changes in working conditions without obtaining the agreement of the employees' representative if the changes act merely to maintain a "long-standing practice" and are so "automatic" as to constitute a "continu-

ation of the status quo. . . ." *N.L.R.B. v. Katz*, 369 U.S. 736, 746, 82 S.Ct. 1107, 1113, 8 L.Ed.2d 230 (1962). The burden is on the employer to show that these changes satisfy this standard. *N.L.R.B. v. Allis-Chalmers Corp.*, 601 F.2d 870, 875 (5th Cir.1979).

Appellant initially contends that the Board's finding that City Cab violated section 8(a)(5) and (1) by unilaterally changing the rental rates and other terms and conditions of employment of its drivers is not supported by the evidence. Specifically, City Cab asserts that it was not required to bargain with the Union regarding the changes of which the Board complains as those changes were merely the continuation of established practices which operated merely to maintain the status quo relationship. City Cab notes that it began systematic adjustments in 1977 and that these adjustments were integrally tied to both swings in demand for taxi service and in driver availability. Though the volatility of market influences prevented the timing and amount of adjustments from being identical in each case, the policy of the adjustments remained consistent, so that a bargaining obligation under the Act was not invoked.

This court will uphold the Board's findings of fact if those findings are supported by substantial evidence. *Ona Corp. v. N.L.R.B.*, 729 F.2d 713, 719 (11th Cir.1984). A review of the record convinces us that the Board's findings of fact satisfied this substantial evidence standard. The parties stipulated that City Cab engaged in five of the six changes alleged in the July 1979 complaint. City Cab further stipulated to nineteen additional changes between 1979 and 1981. Seven of these changes occurred after September 1980, the date of the D.C. Circuit's denial of appellant's petition for rehearing on their unsuccessful appeal. Of these changes, fifteen increased the charges, surcharges, or late penalties extracted from the drivers, while one adjusted the bidding procedure, and another increased the minimum number of shift assignments required before a cab would be issued to a driver.

We view specifically the numerous and irregular fluctuations in cab rental rates which occurred on and after the initial unilateral change in May, 1979. Evidence indicated that in 1978 City Cab operated under an announced schedule of rental rates. The schedule provided for three daily rates—$28.00, $30.00 or $32.00—depending on the particular month. The scheduled rate for May, 1978 was $28.00. In May, 1979 City Cab announced that the daily rental rate would be $32.00. During the next twenty-one months, City Cab raised or lowered the rental rate on twelve occasions. The new rates ranged from a minimum of $30.00 per day to a maximum of $36.00. Before the May, 1979 change, rates had held steady for at least a month, and sometimes for as long as four months. During the period in question, City Cab changed its rates at frequent and irregular intervals, sometimes more than once in the same month. For example, the rental rate was changed twice during the months of November, 1979 and October 1980, and three times during December, 1979. One witness testified that the rates were changed so often that drivers could not keep up with them, while another testified that appellant changed the rates unpredictably and that the drivers never knew what to expect. Testimony was also introduced that appellant never afforded the Union notice of these changes. The record demonstrates similar unprecedented fluctuations in the timing and amount of the mileage surcharge which City Cab also commenced in May, 1979.[2]

On this record, City Cab may not contend that its 1979-81 changes in the rental rate and the mileage surcharge were "a mere continuation of the status quo."

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[2] City Cab initially introduced a surcharge of 5 cents per mile for every mile over 200 which a driver exceeded during a day. It raised that surcharge to 20 cents a mile and lowered the mileage standard to 160 in November 1979. Further changes lowered the surcharge to 10 cents a mile, raised it to 20 cents a mile with a standard of 170, eliminated the surcharge, and reinstated the surcharge at 20 cents a mile above 170.

N.L.R.B. v. Katz, 369 U.S. 736, 746, 82 S.Ct. 1107, 1113, 8 L.Ed.2d 230 (1962). To the contrary, the unprecedented and irregular nature of the changes suggest that they were "the product of an ad hoc decision-making process rather than a continuation of an established company policy." *Aaron Bros. Co. v. N.L.R.B.*, 661 F.2d 750, 754 (9th Cir.1981).

City Cab cites a number of cases for its position that changes similar to those which it instituted have previously been upheld. These decisions are inapposite to the case before us. Unlike the authority cited by appellant, City Cab had not committed itself to any fixed practice, such as switching from piece rates to hourly compensation during shifts from regular production to sample making,[3] providing automatic pay increases after designated lengths of employment or adjusting an employee's compensation in accordance with the particular job which he occupies.[4] As recognized by the ALJ, if City Cab had any practice at all, it was simply one of constant change. City Cab also argues that certain factors beyond its control necessitated these changes, such as totality of consumer demand and the amount of fares allowed by the city, and that as such the changes were merely an automatic response to these factors. Some of the factors were beyond appellant's control, some were not.[5] Whatever the origin of these factors, the changes City Cab instituted were not the "automatic" changes contemplated by the

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[3] *N.L.R.B. v. Phil-Modes, Inc.*, 406 F.2d 556 (5th Cir.1969).

[4] *N.L.R.B. v. Southern Coach & Body Co.*, 336 F.2d 214 (5th Cir. 1964).

[5] The evidence demonstrates that one of the most significant factors considered by appellant in instituting its changes was the number of drivers willing to work for appellant. It can hardly be argued that this factor was not directly controlled by appellant's rental rates. We agree with the ALJ's observation that appellant, in considering this factor, overlooked the fact that this factor, integrally tied to the employer/employee relationship, is one which federal labor law seeks to control.

authority upon which it relies. In fact, the record is replete with admissions that City Cab's response to these changes was instead based upon a delicate and sophisticated analysis of a number of economic factors, such that the company exercised an impermissible degree of discretion for purposes of the Act. Substantial evidence supports the Boards' finding that the changes instituted by City Cab constituted violations of sections 8(a)(5) and (1).

Withdrawal of the Settlement Agreement

On August 26, 1982, the Regional Director set aside the settlement agreement on the grounds that it had "failed in its purpose and because of allegations of post-settlement violations of the Act." City Cab challenges this action, contending such action constitutes an abuse of the Director's discretion as the alleged violations upon which the Director relied in setting aside the agreement were not the subject of timely filed charges. Appellant notes that section 10(b) of the Act provides in part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge." City Cab then contends that the decision in *Inyo Lumber Co.*, 98 N.L.R.B. 984 (1952) extended this limitations period to require that a settlement not be set aside on the grounds of post-settlement unfair labor practices unless a charge regarding those practices is filed within six months of the violation. As no charges were filed within six months of all but one of the alleged violations giving rise to withdrawal of the settlement agreement, City Cab asserts the withdrawal was improper.

Appellant also asserts that the Board violated its own regulations by setting aside the settlement. City Cab points to section 17250.5 of the National Labor Relations Boards' Division of Trial Examiners Public Manual which, at the time of the conduct at issue, provided in part that "where charges of violations of the settlement

agreement are not filed within six months of the violation, the Board will not set aside the settlement." As *Gulf States Mfrs., Inc. v. N.L.R.B.*, 579 F.2d 1298 (5th Cir.1978), *aff'd in part and remanded in part*, 598 F.2d 896 (5th Cir.1979) (en banc) establishes that the Board's failure to adhere to its own regulations renders its decision invalid, appellant asserts, the Board's withdrawal of the settlement, which in the absence of timely filed charges violated section 17250.5, is invalid.

In determining the validity of appellant's complaint as to this issue, we note first that both the Board and the Regional Director relied on two grounds in setting aside the settlement agreement—the alleged post-settlement violations and the inability of the settlement agreement to effectuate its purpose. As a prefix to addressing this issue, we determine whether the Board considered either ground sufficient in and of itself to set aside the agreement. A review of the record convinces us such was the case with respect to the latter ground. The Board noted in its opinion as an undoubted fact appellant and the Region's inability to agree on an appropriate backpay formula and amount, despite the fact that administering this remedy was a primary purpose of the agreement. The Board then cited and quoted from a previous Board opinion holding that in such circumstances there had obviously not been a meeting of the minds when the settlement was executed, so that withdrawal of the settlement agreement was warranted. The Board found that principle equally applicable in this case. We conclude the Board considered the defeat of the settlement's purpose an independent basis for setting aside the agreement.

With this in mind, we now review whether the Board's determination that the settlement agreement failed its purpose and the Board's subsequent withdrawl of the agreement on that ground was proper. Where the purpose of a settlement has been defeated, it is the Board's duty "to take fresh steps to prevent frustration of the

Act." *Wallace Corp. v. N.L.R.B.*, 323 U.S. 248, 254, 65 S.Ct. 238, 241, 89 L.Ed. 216 (1944). The case before us presents such a situation. The language of the settlement agreement indicates that addressing and disposing of the issue of backpay was a primary purpose of the settlement. Union President William Cruz testified that it was his understanding that the agreement would require City Cab to compensate the drivers for all losses suffered from 1979 until the date of an agreement on rental rates.[6] City Cab agreed to "make whole any employees who ha[d] suffered monetary loss" by reason of the rate changes and to pay backpay to its employees "in accordance with established agency policy." The evidence clearly indicated that City Cab employees had in fact suffered losses from the changes instituted. Of the nineteen changes stipulated to by the parties as occurring after the violations alleged in the July 1979 complaint, fifteen of the changes increased the charges, surcharges, or late penalties to which the drivers were subject. A compliance officer who examined the tax records of some City Cab drivers testified that most of these drivers asserted their income had in fact declined after the cab rental changes. Union Vice President Robert Harris' testimony further supported this assertion.

Yet it is undisputed that City Cab and the Regional Director could not agree on an appropriate formula or amount for computing the backpay due. Robert R. Morley, a compliance officer with the Board and extensively involved in the City Cab/Union matter, testified that City Cab owed "substantial backpay" under the settlement agreement entered into between appellant and the Union. Morley devised three possible methods for computing the backpay liability depending upon the time period

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[6] On July 21, 1981, the parties reached agreement on cab rental rates, including a $42.00 daily rate. The agreement was incorporated into the collective bargaining agreement executed on February 2, 1982.

determined applicable. The amount of backpay owed pursuant to these calculations was $200,000, $400,000 and $800,000 respectively. Morely testified he followed established Board policy in arriving at these calculations. Despite this, following a conference with the Regional Director in September 1981, City Cab delivered a letter to the Director in which it denied it had any backpay liability at all. This contention was based primarily on its assertion that the settlement agreement prohibited only unilateral changes made after the D.C. Circuit decision and as it had not increased the rates to drivers since that time no backpay was due. The company maintained this position through almost the entire negotiation period. Finally, in a July, 1982 letter, City Cab presented its only written offer, offering to pay "50% of the amount computed per driver for period involved," an offer which the Region considered unacceptable.

Assuming *arguendo*, that appellant's interpretation that no backpay is owed pursuant to the settlement agreement is reasonable, and accurately reflects what was in its mind at the time of the settlement, the other parties to the settlement had markedly different ideas as to what the settlement was intended to cover. As noted earlier, appellant argued that the settlement was intended to remedy only violations occurring *after* the Court of Appeals' final ruling. This interpretation was based on the language of the stipulation which stated that the settlement agreement was to become effective upon the final disposition in the test of certification case. Neither the Region nor the Union agreed with this interpretation. The Union's understanding was that the settlement covered all changes in rental rates from the time the settlement agreement was signed in 1979 until the Union and City Cab reached agreement on rental rates in 1981. The fact that this was not the reading the employer gave the agreement is abundant evidence that it was not sufficient for its purpose. As far as *Inyo Lumber* is concerned, this happening of post-agreement adjustments without

bargaining might not in themselves be sufficient for setting aside the settlement agreement because of the lack of timely-filed charges, but the fact that the agreement was not sufficient to lay at rest the rights and obligations of the parties as to these violations amply supports the conclusion that the settlement agreement did not effectuate its purpose. Under such circumstances, it is clear the purpose of the settlement agreement had been defeated, and thus the Regional Director acted properly within his discretion in setting aside the settlement agreement. *See e.g., N.L.R.B. v. International Union of Operating Engineers*, 460 F.2d 589, 597 (5th Cir.1972); *International Photographers of Motion Picture Industries, Local 659 v. N.L.R.B.*, 197 N.L.R.B. 1187 (1972), *enforced*, 477 F.2d 450 (1973), *cert. denied*, 414 U.S 1157, 94 S.Ct. 914, 39 L.Ed.2d 109 (1974).

In so ruling, we need not address whether the settlement agreement could have been properly set aside on the basis of the post-settlement violations. Thus, while there is much argument by both parties in their briefs about this issue, we need not explore the effect section 10(b) has upon the Board's ability to set aside a settlement agreement for post-settlement violations which are not the subject of charges filed within six months of the violations. This being the case, the *Inyo Lumber* decision and the Board provision cited by City Cab are inapplicable to our determination of this issue.

Whether Board Action With Respect to the Post-July, 1979 Violations is Time-Barred

We now turn to City Cab's final contention of error, that the Board's failure to find that most of the alleged violations in the consolidated complaint were time-barred by section 10(b) renders its decision and order unenforceable. Here, the Union's July 3, 1979 charge was filed two months after the May, 1979 violations. The Union's second charge was filed July 20, 1981, after the

Company reinstated an excess mileage surcharge on July 13 of that year. City Cab asserts that since this charge was filed almost two years after the unilateral changes in late 1979, and almost a year after the unilateral changes in late 1980, section 10(b) prevents the Board from alleging or finding that the 1979 and 1980 conduct was in violation of the Act.[7] City Cab relies upon *Inyo Lumber* as its principal authority, contending the decision requires that charges pertaining to post-settlement violations be filed within six months of the violation and precludes prosecution of post-settlement violations for which no timely charge is filed.

In *Inyo Lumber*, a Union's February 27, 1950 charge accused the employer of conducting coercive interrogations. The parties executed an informal settlement on March 29, 1950, before any complaint was filed. During May, June or July of 1950, the employer apparently engaged in a number of unfair labor practices—threats, anti-union discharges, and the discretionary shutdown of the employer's operation. On March 3, 1951, nearly ten months after the employer's alleged misconduct between May and July 1950, the Union filed a charge regarding these violations as an amendment to its original February 18, 1950 charge. A complaint subsequently issued. In dismissing the complaint, the Board noted that section 10(b) did not preclude it from prosecuting both pre-settlement and post-settlement violations merely because the post-settlement charge and complaint may have issued more than six months after the original or the subsequent misconduct. However, the Board determined to exercise its *discretionary power* to dismiss the complaint under the circumstances presented because "the Union waited for

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[7] We recognize that section 10(b) is applicable to the extent that the July 20, 1981 charge is timely only as to the July 13, 1981 conduct. Thus, if violations occurring after the July 3, 1979 charge are to be the subject of Board action at all, they must be pulled within the purview of the earlier July, 1979 charge.

more than 9 months [to file its amended charges] and nothing appears in the record to explain or mitigate that delay." In so ruling, the Board explained that a policy prohibiting a charging party from overturning a settlement on the basis of unjustifiably delayed complaints about post-settlement misconduct may serve to reassure charged parties that they can engage in settlements without the risk of having them overturned on the basis of stale claims.

We find that the decision on this issue is not controlled by *Inyo Lumber*. The Board in *Inyo Lumber* recognized that section 10(b) did not preclude it from reactivating the original charges, then elected to exercise its discretion to refuse to reactivate the complaint on the facts before it in that instance. The Board was equally at liberty to exercise its discretion to reactivate the complaint, which it did here. More importantly, in *Inyo Lumber* a settlement agreement existed which was subjected to attack based on the unfair labor practices not the subject of a timely charge. In contrast, we have upheld the withdrawal of the settlement agreement here not because of such unfair labor practices, but because it did not effectuate its purpose. As such, the concerns expressed by the Board in *Inyo Lumber*, that delayed complaints about the post-settlement conduct would serve to undermine the settlement agreement, was not invoked.

We instead find this case controlled by *N.L.R.B. v. Fant Milling*, 360 U.S. 301, 79 S.Ct. 1179, 3 L.Ed.2d 1243 (1959). In that case, the Court addressed whether a complaint can properly include allegations of conduct violative of the Act, which conduct occurred subsequent to the filing of the charge which forms the basis for the complaint. The court concluded that section 10(b) placed no such restriction on the Board. The Court held that the Board may deal with subsequent conduct under a previous charge if the conduct is "related to" the unfair labor practices alleged in the charge and "grow[s] out

of" them while the proceeding is pending before the Board. The Court reasoned that Congress would never have intended that section 10(b) preclude the Board from " 'dealing adequately with unfair labor practices which are related to those alleged in the charge and which grew out of them while the proceeding is pending before the Board.' " 360 U.S. at 309, 79 S.Ct. 1184 (quoting *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 369, 60 S.Ct. 569, 579, 84 L.Ed. 799 (1940)). More importantly, the Court noted that the six-month limitation period imposed by section 10(b) does not relate to conduct subsequent to the filing of the charge, so that even unfair labor practices occurring more than six months after the charge can properly be the subject of a complaint and remedial action by the Board if sufficiently related to the charge. 360 U.S. at 309, n. 9, 79 S.Ct. at 1184 n. 9.

Thus, without the filing of additional charges, a Board complaint may encompass not only the subject of a timely charge but any subsequent misconduct that is sufficiently related "to negate the possibility that the Board is proceeding on its own initiative rather than pursuant to a charge." *N.L.R.B. v. Rex Disposables*, 494 F.2d 588, 590 (5th Cir.1974). Given a sufficiently close relationship between all the allegations in the complaint, it is irrelevant to section 10(b), or to any other policy of the Act, that the complaint may issue more than six months after some or all of the conduct alleged to violate the Act. *N.L.R.B. v. Central Power & Light Co.*, 425 F.2d 1318, 1320-1321 (5th Cir.1970); *N.L.R.B. v. Jack La Lanne Management Corp.*, 539 F.2d 292, 295 and n. 1 (2d Cir. 1976).

In the instant case, as noted, the Union filed a timely charge as to the initial round of unilateral changes. The charges were of precisely the same class of violations as was prescribed in the original complaint. Accordingly, had the settlement not intervened, and if the Regional

Director's investigation had brought to light the 1980 and 1981 violations, *Fant Milling* authorized the Board to issue a complaint consolidating the entire series of unfair labor practices without the necessity of another charge and without regard to the interval between the issuance of the complaint and the violation dates.[8] *See also N.L.R.B. v. International Union of Operating Engineers*, 460 F.2d 589, 600-61 (5th Cir.1972); *Eastern Main Medical Center v. N.L.R.B.*, 658 F.2d 1, 6-7 (1st Cir.1981).

The same principles are equally applicable here despite the settlement agreement. After a timely charge resulting in the issuance of a complaint, the settlement agreement brought to a halt for a time the Boards' investigatory process. With the withdrawal of the settlement agreement, the Board's investigatory powers were reinstated, and ". . . once the Board's (jurisdiction) is properly invoked by the timely filing and review of a charge, any unfair labor practices thereafter committed by a respondent and uncovered while the charge is being investigated become cognizable by the Board and may be included in the complaint." *Ferro Stamping and Mfg. Co.*, 93 N.L.R.B. 1459 (1951). In particular the Re-

[8] Appellant asserts that as neither the ALJ nor the Board invoked *Fant Milling* in dismissing its section 10(b) argument, the General Counsel's "post-hoc reliance" on *Fant Milling* cannot be considered. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69, 83 S.Ct. 239, 245-46, 9 L.Ed.2d 207 (1962). We find this contention unpersuasive. The ALJ recognized City Cab's section 10(b) argument, then held that under applicable law section 10(b) did not render the complaint defective as the charges filed served as a sufficient basis for the complaint. The Board explicitly affirmed this aspect of the ALJ's decision. As is indicated by our opinion here, this represents an accurate statement of the law, and is supported by the *Fant Milling* decision. The Board asserts this same position before us and we uphold the Board's decision "on the same basis articulated in the order by the agency itself." *Burlington Truck Lines, supra* at 169-69, 83 S.Ct. at 245-46.

gional Director was authorized to consolidate within his amended complaint all the post-settlement violations of the Act that had come to his attention whether or not those violations were the subject of any additional "timely' charge as long as they were sufficiently related. *See Globe Gear Co.*, 189 N.L.R.B. 422 (1971), *enforced*, 451 F.2d 1348 (6th Cir.1971). This is exactly what he did. We conclude Appellant's reliance on section 10(b) is misplaced.

Having concluded that all of appellant's allegations of error are without merit, it is hereby ordered that enforcement be GRANTED.

273 NLRB No. 131

D-1342
Orlando, FL

UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 12-CA-8705
12-CA-9788

CITY CAB COMPANY OF ORLANDO, INC.; YELLOW CAB COMPANY OF ORLANDO, INC. d/b/a YELLOW CAB COMPANY and DIXIE CAB COMPANY

and

YELLOW, CITY, DIXIE INDEPENDENT
CAB DRIVERS ASSOCIATION

DECISION AND ORDER

On 26 August 1983 Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions [1] and briefs [2] and has decided

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[1] We note that the Respondent does not attempt to relitigate in this proceeding the status of its drivers as employees within the scope of Sec. 2(3) of the Act.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, City Cab Company of Orlando, Inc., Yellow Cab Company of Orlando, Inc. d/b/a Yellow Cab Company and Dixie Cab Company, Orlando, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. 9 January 1985

DONALD L. DOTSON Chairman

ROBERT P. HUNTER, Member

PATRICIA DIAZ DENNIS, Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

[3] In the penultimate paragraph of sec. III,A,3(b) of his decision, the judge states that Union Secretary Angelo Spedale testified that there were two other cab companies in Orlando. The record establishes that this evidence was introduced through the testimony of Respondent's night manager Duane Johnson. Also, in the first paragraph of sec. III,B,4 of his decision, the judge states that the Respondent's argument that the complaint is defective because not based on timely filed charges is "expressly linked" by the Respondent to its argument that the settlement agreement was improperly set aside by the Regional Director. However, in its posthearing brief to the judge, and again in its brief in support of its exceptions, the Respondent did assert, as an alternative argument, that even if the settlement agreement had been properly set aside, the complaint would still be barred by Sec. 10(b). We reject the Respondent's arguments in this regard. In affirming the judge's finding that the settlement agreement was properly set aside, we find it unnecessary to address the issue of whether the complaint would have been barred by Sec. 10(b) if the settlement agreement had *not* been properly set aside.

JD-(ATL)-62-83
Orlando, Florida

UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
ATLANTA, GEORGIA

Cases 12-CA-8705
12-CA-9788

CITY CAB COMPANY OF ORLANDO, INC.; YELLOW CAB COMPANY OF ORLANDO, INC. d/b/a/ YELLOW CAB COMPANY and DIXIE CAB COMPANY

and

YELLOW, CITY, DIXIE INDEPENDENT CAB DRIVERS ASSOCIATION

Mrs. Margaret J. Diaz, Esq., for the General Counsel.

Harrison C. Thompson, Jr., Esq., and *Thomas M. Gonzalez, Esq.* (Shackleford, Farrior, Stallings & Evans), Tampla, FL, for the Respondent.

Joseph Egan, Jr., Esq., for the Charging Party.

DECISION

Statement of the Case

HOWARD I. GROSSMAN, Administrative Law Judge: The charges in the cases listed in the caption above were filed on dates described hereinafter by Yellow, City,

Dixie Independent Cab Drivers Association (herein the Charging Party, or the Union). A consolidated complaint issued on September 1, 1982, alleging that City Cab Company of Orlando, Inc., Yellow Cab Company of Orlando, Inc. d/b/a Yellow Cab Company and Dixie Cab Company (herein collectively Respondent) changed the cab rental fees paid by, or the working conditions of, its drivers, in 29 separate instances—6 on May 1, 1979, 9 in the last 4 months of 1979, 10 in 1980, and 4 in 1981. The complaint alleges that these acts were engaged in without giving the Union prior notice and an opportunity to bargain, and were therefore violative of Section 8(a)(1) and (5)of the National Labor Relations Act (herein the Act).

A hearing was held before me on these matters in Orlando, Florida, on November 15 and 16, 1982. Upon the entire record, including my observation of the demeanor of the witnesses, and consideration of briefs filed by the General Counsel and Respondent, I make the following:

Findings of Fact

I. Jurisdiction

The various companies collectively designated as Respondent are affiliated business enterprises with common officers, ownership, directors, management, supervision, a common labor policy, and shared common premises and facilities. They have provided services for each other, have interchanged personnel with each other, and have held themselves out to the public as a single integrated enterprise. Because of these factors, Respondent constitutes a single employer within the meaning of the Act. During the calendar year preceding issuance of the complaint, Respondent derived gross revenues in excess of $500,000 and purchased and received at its Orlando, Florida, facility, parts and supplies valued in excess of $10,000, which were shipped directly to it from points located outside the State of Florida. Respondent is an

employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act

II. The Labor Organization Involved

The complaint alleges and the answer denies that the Union is a labor organization. However, on October 26, 1977, the Union was certified by the National Labor Relations Board (herein the Board) as the exclusive representative of Respondent's drivers (G.C. Exh. 14). Thereafter, the Board found with judicial approval that the Union is a labor organization within the meaning of the Act. *City Cab Company or Orlando, Inc.; Yellow Cab Company of Orlando, Inc. d/b/a Yellow Cab Company and Dixie Cab Company*, 242 NLRB 94 (1979), enfd. 628 F. d 261, 104 LRRM 3053 (D.C. Cir., 1980). I reaffirm these prior findings.

III. The Alleged Unfair Labor Practices

A. *Factual summary*

1. *The allegations of unilateral changes in Case 12-CA 8705 and the Settlement Agreement*

After the Union's certification in 1977 as described above, the parties bargained, and entered into an interim collective-bargaining agreement in March 1978. Thereafter, based on a judicial decision in another case finding certain taxi drivers to be independent contractors, Respondent withdrew recognition from the Union in November 1978. The Union filed a charge in December 1978 (Case 12-CA-8436), and, following the General Counsel's Motion for Summary Judgment, the Board's Decision and Order issued in May 1979, finding that Respondent had violated Section 8(a)(5) and (1) by refusing to bargain with the Union. *City Cab Company of Orlando, Inc., et al., supra.* Respondent thereafter filed a petition for review of that decision, and the Board filed a cross-application for enforcement. The Union made a written

request that Respondent bargain with it, and the Company answered with a written refusal (G.C. Exhs. 4, 5).

On July 3, 1979, two months after issuance of the Board's decision in the first case, the Union filed the charge in Case 12-CA-8705, and complaint issued on July 25, 1979, alleging 6 instances of unilateral changes in the terms and conditions of the drivers' employment on May 1, 1979, in violation of Section 8(a)(5) and (1). In general, these constituted increases in the Company's charges to the drivers for leasing a cab, or as the Company put it, "selling services" to the drivers.[1]

The following month, August 1979, the parties entered into an informal settlement agreement with the approval of the Regional Director for Region 12. The agreement itself is on one of the Board's standard forms for such purposes, which include a provision that the charged party will "make whole the employees named below by payment to each of them of the amount set opposite his or her name." No employees are so named in the agreement, but the parties included a clause in the backpay section providing that "[b]ackpay will be computed in accordance with established agency policy" (G.C. Exh. 3(a)). Union President Cruz testified that he understood that the agreement required the Company to compensate the drivers for all monetary losses from 1979 until the date of an agreement on rental rates.

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[1] The Company also employs "commission drivers," who are paid a commission on all fares. They are not involved in this proceeding. As indicated in the prior record, the Company attempted to change from commission drivers to contract drivers, whom it called independent contractors. Company President Mears testified in the instant proceeding that this was not entirely successful, because the contract drivers would refuse to accept a call if they considered it unprofitable. The Company was therefore unable to provide complete service. Accordingly, it now retains a limited number of commission drivers, whom it may order to take calls, according to Mears.

The agreement also requires the charged party to post a notice, and to comply with its terms and provisions. In the notice Respondent states that it will if necessary make whole any employees who have incurred monetary loss as a result of "any" unilateral changes in terms and conditions of employment [G.C. Exh. 3(c)]. A further clause in the agreement specifies that execution of the agreement does not constitute an admission that the charged party has violated the Act (G.C. Exh. 3(a)).

At the same time, the parties and the Regional Director for Region 12 entered into a stipulation providing that the settlement agreement would be null and void if the reviewing court in the first case rejected the Board's position that the drivers were employees as defined in the Act. On the other hand, if the court rejected Respondent's position that the drivers were independent contractors, then Respondent agreed "to remedy the violations alleged in the instant case by immediately abiding by and giving full force and effect to the Attached Informal Settlement agreement" (G.C. Exh. 3(e)).

During the remainder of 1979 and the first part of 1980, Respondent pursued its appeal from the Board's decision in the first case. The decision of the Court of Appeals for the District of Columbia Circuit, enforcing the Board's Order, issued on July 30, 1980 (*id.*). Respondent filed a petition for rehearing in August 1980, and this was denied in September 1980.

2. *The bargaining history, and Respondents' objections to Union President Cruz*

William Cruz,[2] the Unions' president, had worked for and had been discharged by Respondent. Cruz filed an unfair labor practice charge and then withdrew it. He thereafter drove a cab, and was active in the organization of an "Independent Taxi Owners Association"

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[2] Cruz' full name is William Cruz Pizzaroz.

(IATO). In July 1980 he issued a notice to members of the association, in which he referred the members as "we (Independent Owners)" (Resp. Exh. 3). Cruz himself drove a cab for another company, but was not an owner of the company according to the credible testimony of Angel Santiago. Nor was he a member of IATO since his wife owned the cab which he drove.

Following denial of Respondent's request for rehearing in September 1980, the Union's attorney sent a letter to Respondent's attorney in November 1980 requesting bargaining "after three years of litigation" (G.C. Exh. 9). On the same day, Respondents' attorney wrote a letter to Cruz asserting that the Company was not obligated to bargain with a committee of which Cruz was a member, because of his "past conduct" as a driver for the Company and his "present position with another competitive taxicab company" (G.C. Exh. 8). Nonetheless, Cruz was present as a member of the Union negotiating team when the parties commenced bargaining in January 1981.

The court's decision in the first case shows that Respondent had 115 out of a total of 127 taxicab permits issued by the City of Orlando (104 LRRM at p. 3054). Cruz spoke with the city's mayor in favor of "deregulation," the issuance of additional permits, and what he called the "free enterprise" system. The principal proponent of deregulation was the city attorney, according to Company President Mears. In February 1981, Cruz testified at a meeting of the Orlando City Council, and opposed the system of rental fees charged to drivers by Respondent (Resp. Exh. 4). In March the city increased the allowable number of permits to 220, which posed a threat to Respondent according to Mears. He protested Cruz' actions, and, in April 1981, filed a charge against the Union alleging violation of Section 8(b)(3) (Resp. Exh. 5). Cruz then voluntarily withdrew from the contract negotiations pending disposition of the charge.

On June 12, 1981, the Regional Director for Region 12 dismissed the Section 8(b)(3) charge. His letter of dismissal indicates that Respondent had made a number of allegations. In response, the Regional Director stated that "there is no evidence that Cruz has operated a business in competition with the Employer or has been affiliated with any competitor of the Employer." As for the evidence that Cruz supported deregulation which would hurt Respondent economically, the dismissal letter observes that "the union represents commissioned drivers of the Employer whom deregulation would help, as well as salaried drivers. Cruz' pursuit of the interests of those bargaining unit employees whose interests do not totally coincide with the Employer's is deemed insufficient to bar him from bargaining with the Employer on behalf of all unit employees" (Resp. Exh. 6).

Cruz thereafter returned to the negotiations, and was present on July 21, 1981, when the parties reached agreement on cab rental rates, including a $42 daily rate. This was incorporated in a collective-bargaining agreement which the parties executed on February 2, 1982, (G.C. Exh. 7).

3. *The Region's efforts to secure compliance with the settlement agreement*

As these events were taking place, the Compliance Officer for Region 12 was attempting to obtain compliance with the settlement agreement in Case 12-CA-8705, following the court's denial of Respondent's petition for rehearing in September 1980. Respondent did post the notice set forth in the agreement. However, the Region was unsuccessful in getting Respondent to undertake the additional action which, the Region believed, was required by the settlement agreement.

(a) *The backpay issue*

Robert R. Morley, an experienced compliance officer, testified that Respondent owed "substantial backpay" un-

der the settlement agreement. He computed the amount due under existing Board policy, utilizing three different time periods. The amounts under these three alternative calculations were $200,000, $400,000, and $800,000, respectively. In making these computations, Morley used the drivers' records of their trips, since the Company contended that it did not keep such records beyond 90 days.

Morley was unable to obtain agreement on backpay from Respondent, and, following a conference with the Regional Director in September 1981, Respondent delivered a letter to the Director setting forth the conclusion that it did not owe any backpay, with the following arguments:

1. The Company has not increased the rental rates charged to drivers since the date of the Court's decision, and therefore owes no backpay. (This argument implies that the settlement agreement requires compliance therewith only from the date of the court's decision.)

2. There could have been no bargaining with the Union from August 1979 until September 1980 because the Union was "defunct," and its president Cruz was attempting to destroy Respondent's business.

3. The settlement agreement only contemplated backpay as a result of "monetary loss" sustained by the drivers. Even if there had been "improper 'unilateral changes.'" there was no such loss for reasons which are "a bit complex." The taxicab business is "volatile," and is related to seasonal changes. "When the rates are increased some drivers leave, thus leaving more business for the remaining drivers." Respondent supplied data purporting to show an increase in rental rates from 1978 through 1980, and an increase in drivers net income. Accordingly, it argued in its letter, additional backpay to the drivers would provide them with a "windfall" (G.C. Exh. 15).

On the other hand, Compliance Officer Morley, who examined the tax records of some the drivers, testified

that most of them asserted their income had declined after the rental changes. Union Vice President Robert Harris gave similar testimony. As for any causal relationship between the rental changes and what the Company contended were increases in net driver income, Mears agreed that there was one minor fare increase allowed by the city during the period covered by his figures. He also stated that his computations did not include the price of gasoline purchased by the drivers.

In July 1982, Respondent delivered a letter to Regional Compliance Officer Morley offering to pay "50% of the amount computed per driver for period involved" (G.C. Exh. 16).[3] The Region considered this offer to be unacceptable.

(b) *Respondent's rationale for rental increases*

Mears provided a rationale for higher rental fee charged to the drivers. Thus, he contended that the higher fee reduces the number of drivers willing to pay it, and thus increases the amount of business available to the remaining drivers. He was asked whether these remaining drivers had to work harder in order to make the same income they had earned at the lower rental fees. Although Mears contended that they did not have to work any "longer," he agreed that they had to make

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[3] The offer was introduced by the General Counsel during redirect examination of Compliance Officer Morley. During cross-examination, Respondent's counsel had asked Morley about their "many discussions" of the backpay issue, including the nature of "any offers or proposals" made by Respondent. In response, Morley made reference to a "letter" from Respondent. On redirect examination he identified the Company's July 1982 letter as the one he was referring to on cross-examination. The document was received over Respondent's objection on the ground that the General Counsel had the right on redirect examination to introduce evidence pertaining to matters brought up on cross-examination. My ruling included the provision that receipt of the document was not for the purpose of establishing any backpay obligation or the commission of an unfair labor practice.

"more trips." In general, Mears argued that the Company had to "walk a fine line" in providing needed revenue for the Company, a fair living for the drivers, and adequate taxicab service for the city. Accordingly, he asserted that the rate change were in accordance with past practice and were economically justifiable.

Mears stated that the "history of rates has generally been higher not lower." He said there were "seasonal adjustments" and "technical adjustments." As an example of the latter, the Company president testified that it is difficult to get drivers to work on holidays. Accordingly, he reduces the rates during these periods to induce more drivers to take out cabs. Other factors taken into account are consumer demand, and charges in the rates which the city allows the drivers to charge the customer. If that rate goes up, then, as Mears frankly conceded, the Company wants a share of the increase. He defended an "airport surcharge" added to the fares of airport customers. In general, according to Mears, the Company seeks to meet the demand for taxicab services with the least possible number of cabs on the street. It also tries to limit the mileage driven by the cabs, by use of the daily mileage surcharge.

Mears noted that, although there were rental changes subsequent to the date that the court denied Respondent's request for a rehearing (September 1980), none of these changes went above the rate then in effect, $36, until the date the parties agreed on a $42 rate in July 1981.

Other witnesses gave different versions of the rate changes. Angelo Spedale, a union official, said that Mears changed the rates so often that the drivers could not keep up with them. Duane Johnson was a former Union president who was replaced by Cruz. Called as a witness by Respondent, he affirmed on cross-examination that the Union was formed because Respondent was changing the rates "unpredictably," that the drivers did not know what to expect, and that a few of them were forced out of

business by the changes. Although there were two other small cab companies according to Spedale, they had only about 12 cabs, and Respondent was the only employer who, as a practical matter, was available to an individual who wanted to drive a cab.

Robert Harris, vice-president of the Union, denied that the Union's agreement to the $42 rate in July 1981 was occasioned by agreement that a higher rate would result in larger earnings for drivers. Although there were seasonal fluctuations, the drivers lost money during a two-year period. The Union agreed to the $42 rate in July 1981 because they were already being charged a mileage charge which brought the previous $36 rate up to about $40, and because the city had just granted a fare increase to which the drivers were "held hostage" (because the Company wanted a share of the higher fare). Harris opposed the airport surcharge as coming out of the tip which the driver could expect. If the surcharge is not collected from the customer, the driver has to pay it.

(c) *Continued unilateral changes*

The parties stipulated that Respondent engaged in 5 of the 6 changes on May 1, 1979, alleged in the complaint in Case 12-CA-8705. They also stipulated to 10 additional such changes in 1979, 5 in 1980 (including 3 after September 1980, the date of the court's denial of Respondent's petition for rehearing), and 4 in 1981. One of the latter, reinstatement of a daily mileage surcharge on July 13, 1981, was the subject of a new unfair labor practice charge in Case 12-CA-9788. Fifteen of the changes, increased the charges, surcharges, or late penalties which the drivers were required to pay, while one altered the bidding procedure, and another increased the minimum number of shift assignments to warrant issuance of cab to a driver. Seven of the changes reduced the charges to the drivers.

Cruz testified that Respondent did not give the Union notice of these changes or an opportunity to bargain

over them. Mears contended that the changes were posted on the bulletin board, that Cruz must have known of them, and that the Union never requested bargaining concerning the changes. Mears agreed that he had about two meetings with drivers to discuss changes and that he did not invite union officials.

(d) *Setting aside the settlement agreement, and issuance of the consolidated complaint*

By letter to the parties dated August 26, 1982, the Regional Director for Region 12 set aside the settlement agreement because it had "failed in its purpose and because of allegations of post-settlement violations of the Act" (G.C. Exh. 3(f)). Thereafter, as indicated above, the consolidated complaint issued on September 1, 1982.

B. *Legal Conclusions*

1. *Interpretation of the settlement agreement*

Respondent contends that the settlement agreement requires it to remedy only the violations alleged in the complaint in Case 12-CA-8705, i.e., the unilateral changes on May 1, 1979. "[T]here was no promise to refrain from making future changes except one that by the terms of the settlement would not take effect until the appellate court had issued its ruling."

I conclude that this argument is erroneous. The settlement agreement requires Respondent to comply with the terms of the notice, and the latter requires the Company to make employees whole for monetary loss suffered as a result of "any" unilateral changes in terms and conditions of employment. When Respondent executed the stipulation, it agreed to "give full force and effect" to the settlement agreement upon losing its appeal, and thereby undertook to make whole employees suffering monetary loss as a result of "any" unilateral changes.

As a corollary argument, Respondent seizes upon the requirement in the stipulation that it give full force and effect to the settlement agreement "immediately" (upon loss of its appeal), and argues that this shows that that prior violations—other than those alleged in the complaint—were not included. This is not a reasonable interpretation of the language in the stipulation. The word "immediately" describes when it is that Respondent shall comply with the settlement agreement, i.e., without delay upon loss of its appeal. It does not specify the actions required to constitute compliance with the settlement agreement. Having been charged with unfair labor practices, and having conditionally agreed in August 1979 to remedy "any" such practice upon rejection of its position by the court, Respondent committed additional such practices at its peril.

This dispute has limited relevance in any event, since it pertains only to the unilateral changes taking place after May 1, 1979, and before July 30, 1980, when the court issued its "ruling" (in the language of Respondent's September brief). Respondent admits that the agreement covers the May 1, 1979, changes, and all those taking place after the court's "ruling." As the record shows, Respondent committed further violations after the court issued its ruling, and, indeed, committed 7 of them after September 1980, when Respondent's petition for rehearing was denied.

2. *Setting aside the settlement agreement*

(a) *The continuing unilateral changes*

Respondent's continued unilateral changes, which I conclude hereinafter were unfair labor practices, are sufficient to justify setting aside the settlement agreement. Respondent argues to the contrary, citing *Radio Station KHMO*, 102 NLRB 26 (1962), *Deister Concentrator Co.*, 253 NLRB 358 (1980), and *Utrad Corpora-*

tion, 185 NLRB 434 (1970). Respondent apparently relies on *KHMO* because of its asserted belief that the unilateral changes herein did not violate the settlement agreement. This is clearly incorrect, and *KHMO* actually supports the General Counsel's position. *Deister* is not on point, because the post-settlement violations therein were unrelated to the presettlement violations, whereas they are closely related in the case at bar. Indeed, they are identical in nature. *Utrad* is also inapposite, because the post-settlement violations were remote in time and did not affect the remedial order, whereas the unilateral changes herein continued in an unbroken sequence and directly affect the remedial order. Authority for the Regional Director's withdrawal of the settlement agreement herein may be found in *Sheet Metal Workers Local 80, Sheet Metal Workers' International Association, AFL-CIO (Sise Heating & Cooling Company)*, 236 NLRB 41 (1978); and *Northern California District Council of Hodcarriers and Common Laborers of America, AFL-CIO, etc. (Joseph's Landscaping Service)*, 154 NLRB 1384 (1965).

(b) *The absence of agreement on backpay*

The language of the settlement on backpay appears to indicate that Respondent agreed to pay backpay to its employees "in accordance with established agency policy." It is also clear from Cruz' testimony that the Union expected the Company to pay backpay to its employees. As an additional undoubted fact, Respondent and Region 12 could not agree on an appropriate backpay formula or amount. Indeed, at one point in the negotiations, the Company contended that it did not owe any backpay, because the drivers had not suffered any "monetary loss." Respondent continues this argument in its brief herein. Respondent's only offer—"50% of the amount computed per driver for period involved"—is so vague as to be meaningless. In similar circumstances the Board has concluded as follows:

> It appears obvious . . . that there was no meeting of the minds when the settlement agreements were executed . . . Respondent expected a liability substantially less than . . . the amount ultimately computed by the Regional Director. And the Regional Director was apparently faced with uncertainty as to the choice of formula for making his determination. In such circumstances, we believe that it would be inequitable to hold the parties to the commitments contained in the settlement agreements, and we find that the Regional Director did not commit reversible error in withdrawing approval of the settlement agreements and reopening the case for further proceedings. While settlement agreements are entitled to be treated with sanctity and should not be lightly set aside, we recognize that circumstances can exist which warrant permitting withdrawal from a settlement agreement. Such is the case here. *International Photographers of the Motion Picture Industries, etc. (MPO-TV of California Inc., Y-A Productions, Inc.)*, 197 NLRB 1187 (1972).

I conclude that the same principle is applicable in this case, and constitutes further warrant for the Regional Director's setting aside the settlement agreement.

3. *Respondent's unilateral changes of its drivers' working conditions*

"Initially, it is well settled that unilateral changes in the terms and conditions of employment, as admitted herein, without bargaining with a union certified as exclusive representative of the unit employees, violate Section 8(a)(5)." *Amsterdam Printing and Litho Corp.*, 223 NLRB 370, 372 (1976).

Respondent, however, argues that "changes which are continuations of past and established practices do not violate Section 8(a)(5) even in the absence of bargaining . . . Quite simply, the law is that where changes are a normal and established fact of life for the employer and its employees, then the existence of an obligation to

bargain does not require a change in that pattern." Respondent relies on two decisions by the Court of Appeals for the First Circuit, *N.L.R.B. v. Phil-Modes, Inc.*, 406 F.2d 556 (5th Cir., 1969), enfg. in part 162 NLRB 1435 (1967), and *N.L.R.B. v. Southern Coach & Body Company, Inc.*, 336 F.2d 214 (5th Cir. 1964), denying enf. of 141 NLRB 80 (1963). In *Phil-Modes*, where the employer shifted from a piecework to an hourly rate of compensation during sample-making periods, the court's decision read in relevant part as follows:

> We cannot agree from the record before us that a unilateral change in the wages of employees was shown. The evidence shows that the shift to hourly pay during the sample-making period had been effected every year that the respondents had been in operation. While the sample-making period lasted for different lengths of time each year, the beginning, duration, and end of the period were "triggered" each year by the demands of customers, which in turn depended on whether the season for coats manufactured by the respondents was early or late. There has been no finding that the hourly rate paid during the sample-making period of the year in question was different from that paid in the sample-making period of any other year or even that the total compensation during the sample-making period had varied" (id. 406 F.2d at 557).

In *Southern Coach & Body*, where the employer followed past practice in giving automatic wages to new employees three and six months after they began work, and in paying employees according to the operation they performed, the court states:

> . . . [T]he Supreme Court clearly indicated in both the *Crompton-Highland*[4] and *Katz*[5] cases that a

[4] *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1948).

[5] *N.L.R.B. v. Katz*, 369 US. 736 (1962).

mere continuation of the status quo during the bargaining period cannot constitute a disparagement of the bargaining process; there must be an actual *change* in working conditions. Therefore, as to the three-month and six-month automatic increases, there is no evidence on which to base a conclusion that Section 8(a)(5) was violated.

An additional number of wage increases resulted from the company's established policy of paying an employee the wage rate applicable to a new operation when it was necessary that he perform that operation . . . There is no indication in the record that the promotions deviated from past company policy, or that there was any motive other than economic necessity. None of the rates themselves were altered in any fashion. The Board argues that the company was required to consult the union about each of these changes because each involved an element of discretion which precluded the union from ascertaining whether there had been a deviation from past company policy. In support of this contention, the Board relies on *N.L.R.B. v. Katz, supra,* which held, *inter alia,* that the granting of individual merit increases without consultation with the bargaining agent constituted an 8(a)(5) violation. We feel that there is a distinction between individual merit increases and promotions which were made in the instant case. Individual merit increases are discretionary increases in pay based upon management's assessment of the performance of an individual employee. They are not motivated by economic necessity, but are a means of rewarding favored employees. The promotions involved here, on the other hand, were necessitated by the strike, and did not involve discretionary raises in pay. Hence, we do not feel that Section 8(a)(5) precludes an employer from making the necessary adjustments in his work force which were made here in the absence of some

> evidence that he has deviated from established company policy or has refused to bargain with respect to the standards to be used for promotion . . ." (id., 236 F.2d 214 at pp. 217-218).

The Court of Appeals for the District of Columbia Circuit addressed the same problem as follows:

> In *Katz* the Supreme Court held that an employer cannot unilaterally change conditions of employment during the course of negotiations with a union; if the company desires to alter a pre-existing practice, it must give the union an opportunity to bargain over the change. The Court applied this principle to distinguish between automatic wage increases to which the employer has already committed itself and wage increases that are "in no sense automatic, but [are] informed by a large measure of discretion." 369 U.S. at 746. The employer would be required to grant the automatic wage increase unless it notified the union that it wishes to make a change in the existing conditions of employment and gave the union an opportunity to bargain over the change. However, the employer could not unilaterally grant a non-automatic, discretionary wage increase since "[t]here simply is no way in such a case for a union to know whether or not there has been a substantial departure from past practice . . . Id. Thus, the union could "insist that the company negotiate as to the procedures and criteria for determining such increases." *N.L.R.B. v. Blevins Popcorn Co.*, ———, 107 LRRM 3108 (D.C. Cir., 1981).

I conclude that the record in this case does not justify Respondent in making unilateral changes in its employees' working conditions under the criteria set forth by the Supreme Court in *Katz* and explicated by the courts cited above. Respondent had not committed itself to any fixed practice, such as shifting employees from piecework to hourly compensation during sample-making periods,

giving new employees automatic increases after specific periods of employment, or changing employees' pay in accordance with the operation they were performing.

If Respondent had any practice, it was simply one of constant change, caused by a multiplicity of factors. Some of these, such as the totality of consumer demand and the amount of fares allowed by the city, were beyond Respondent's control. Others, particularly the number of drivers willing to work for Respondent, were directly controlled by Respondent's rental rates. The evidence shows that this factor was one of the most, if not the most significant, of the factors which Respondent considered. To argue, as does Respondent, that its changes in rental rates were merely an impersonal response to the market, i.e., the supply of drivers available at specfic rates, overlooks the fact that it is *this* market, found in the employer-employee relationship and the terms and conditions of employment, which federal labor policy seek to control, and in which an employer is subject to legal restraints.

Mears agreed that he had to walk "a fine line" in juggling the demands of the city, financial needs of his company, and the demands of his employees. He thus exercised a high degree of discretion in changing the rental rates. He did so without giving notice to the Union, and held meetings with employees on the increases without inviting the Union.

Respondent argues that the Union failed to protest the changes for an inordinate period of time. This argument turns the entire settlement procedure upside down. The Union *had* alleged unlawful unilateral action in the first charge, and the Region was attempting to get Respondent to comply with its promise not to engage in any further changes. It would have been useless for the Union to have protested each additional change under these circumstances. As to each change, the Union "was presented with a *fait accompli*, making a request to bar-

gain about it a futile and unnecessary gesture. *Peat Manufacturing Company*, 261 NLRB No. 26, fn. 2 (1982).

I therefore find that, by engaging in the above-described unilateral changes in its employees' terms and conditions of employment, Respondent thereby violated Section 8 (a) (5) and (1) of the Act.

4. *Respondent's additional arguments*

Respondent presents an elaborate argument to the effect that the complaint is defective because it is not based upon a charge filed within six months of the alleged unfair labor practices, and is therefore contrary to the mandate of Section 10(b) of the Act. However, this argument is expressly linked by Respondent to its contention that the settlement agreement was improperly set aside—an argument I have rejected. The complaint herein was clearly warranted on the basis of the two charges which were filed, under applicable law.

Respondent also argues that the receipt into evidence of details of the settlement discussions prejudiced its case because "the Judge has heard that the companies were willing to pay some money to settle the case." Accordingly, Respondent argues, a new trial is required.

This argument has no merit. Testimony with respect to Respondent's willingness to pay backpay was directly related to its undertaking to do so in the settlement agreement, and to the issue of whether that agreement had properly been set aside. The evidence of Respondent's negotiations with the Compliance Officer showed that it *denied* that it had any obligation to pay backpay. The only evidence of its willingness to do so is its letter of July 1982—a document submitted by the General Counsel on redirect examination of Compliance Officer Morley after Respondent initially raised the subject on cross-examination. As noted above, the letter was received

with the express provision that it was not to be considered evidence of any unfair labor practice.

Respondent also presents an argument based on the conduct of Union President Cruz, which requires no comment in light of the facts set forth above.

In according with my findings above, I make the following:

Conclusions of Law

1. City Cab Company of Orlando, Inc., Yellow Cab Company of Orlando, Inc. d/b/a Yellow Cab Company and Dixie Cab Company together constitute a single employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Yellow, City, Dixie Independent Cab Drivers Association is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is now and has been at all times material herein an appropriate unit for the purpose of collective-bargaining within the meaning of Section 9(c) of the Act:

> All regular and part-time taxi drivers at Respondent's West Gore Street, Orlando, Florida, facility, including contract drivers and Winter Garden drivers; excluding all other employees, dispatchers, starters, office clerical employees, guards, and supervisors as defined in the Act.

4. On October 14, 1977, a majority of the employees in the unit described above, by secret ballot election conducted by the Board, selected the above-named Union as their representative for the purposes of collective bargaining with Respondent, and, on October 26, 1977, the Board certified the Union as such exclusive representative.

5. At all times since October 26, 1977, and continuing to date, the Union has been and is the exclusive repre-

sentative of the employees in the unit described above for the purpose of collective-bargaining with the respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

6. By engaging in unilateral changes in the terms and conditions of its employees' employment on 24 separate occasions from 1979 through 1981, without notice to the Union or an opportunity for it to bargain concerning those changes, Respondent thereby committed unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

7. On August 30, 1979, a settlement agreement entered into by Respondent and the Union, intended to remedy some of the practices described above, was approved by the Regional Director for Region 12.

8. On August 26, 1982, the Regional Director for Region 12 appropriately set aside the aforesaid settlement agreement, because it had failed in its purpose and because of post-settlement violations of the Act.

9. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6), and (7) of the Act.

10. Respondent has not violated the Act except as specified herein.

The Remedy

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. Thus, I shall recommend that Respondent cease and desist from engaging in unilateral changes in the terms and conditions of its employees' employment, that it notify the Union in advance of any contemplated changes and give it an opportunity to bargain concerning them.

It is also appropriate that Respondent be required to make whole, with interest, all employees who may have suffered losses in earnings as a result of said unilateral changes in their terms and conditions of employment. *El Centro Community Mental Health Center*, 266 NLRB No. 1, fn. 1 (1982). Accordingly, I shall include such a provision in my recommended order.[6]

The General Counsel also appears to request issuance of a general bargaining order. It should be noted that the violations herein took place prior to the parties' execution of a collective-bargaining agreement. There is no allegation that Respondent is failing to abide by the terms of this agreement, and accordingly, I consider issuance of a general bargaining order to be inappropriate.

I shall also recommend that Respondent be required to post appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, I recommend the following:

ORDER[7]

City Cab Company of Orlando, Inc., Yellow Cab Company of Orlando, Inc. d/b/a Yellow Cab Company and Dixie Cab Company, and their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally changing the rental rates or other terms and conditions of employment of their drivers,

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[6] The General Counsel does not request a specific backpay order, nor would one be warranted on the basis of the pleadings and evidence in this case.

[7] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

without giving advance notice thereof to Yellow, City Dixie, Independent Cab Drivers Association and affording it an opportunity to bargain concerning any such changes.

(b) In any like or related manner interfering with restraining, or coercing employees in the exercise of the rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Make whole its drivers for any loss of earnings they may have suffered, with interest thereon, as a result of Respondent's unilateral changes in the rental rates and other terms and conditions of employment of its drivers.[8]

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all existing payroll records, social security payment record, timecards, personnel records and reports, records of rental rate changes, records of drivers' gross and net earnings, trips, shifts, changes in allowable fares set by the City of Orlando or other appropriate authority, and all other records from 1977 through 1981 necesasry to analyze the backpay and benefits due under the terms of this Order.

(c) Post at its Orlando, Florida, facility copies of the attached notice marked "Appnedix A."[9] Copies of said

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[8] Interest on amounts due under this paragraph shall be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.[10]

Dates at Washington, DC August 26, 1983.

/s/ Howard I. Grossman
HOWARD I. GROSSMAN
Administrative Law Judge

[10] The General Counsel's unopposed Motion to Correct Transcript, attached hereto as "Appendix B," is hereby granted.

"APPENDIX A"

NOTICE TO EMPLOYEES

[SEAL] POSTED BY ORDER OF THE [SEAL]
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE
UNITED STATES GOVERNMENT

After a hearing at which all sides had an opportunity to present evidence and to present their positions, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, and has ordered us to post this notice. We intend to carry out its provisions as follows:

WE WILL NOT unilaterally change the rental rates or other terms and conditions of employment of our drivers, without giving advance notice thereof to Yellow, City, Dixie Independent Cab Drivers Association and affording it an opportunity to bargain concerning any such changes.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of rights guaranteed under Section 7 of the Act.

WE WILL make whole our drivers for any loss of earnings they may have suffered, with interest, as a result of our unilateral changes in their rental rates and other terms and conditions of employment.

CITY CAB COMPANY OF ORLANDO, INC.,
YELLOW CAB COMPANY OF ORLANDO
d/b/a YELLOW CAB COMPANY and
DIXIE CAB COMPANY
(Employer)

Dated ———— By ————————————
(Representative) (Title)

————

This is an Official Notice and
Must Not Be Defaced By Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Robert L. Timberlake Jr. Federal Office Building, Room 706, 500 Zack Street, Tampa, FL 33602 Telephone: (813) 228-2662

"APPENDIX B"

MOTION TO CORRECT TRANSCRIPT

Now comes Counsel for the General Counsel who requests that the Honorable Howard I. Grossman, Administrative Law Judge, correct certain reportorial errors in the transcript in the above-entitled cases. Specifically, Counsel for the General Counsel requests that the transcript be corrected to read as follows:

TR. 8, 1. 10 "changes made in drivers' working conditions. . ." instead of "chances made and drivers working conditions. . ."

TR. 29, 1. 3 "with no objection." instead of "with objection."

TR. 32, 1. 3 "The state of. . ." instead of "The date of . . ."

TR. 39, 1. 11-13 "at times from now on I will call Yellow, City, Dixie Independent Cab Drivers Association 'the association'. . . instead of "at times from now on I will call Yellow, City, Dixie Independent Cab Drivers Association, association. . ."

TR. 55, 1. 16 "as to the changes in working. . ." instead of "as to the changes and working. . ."

TR. 57, 1. 4-5 "a basis that. . . in finding. . . agreements are . . ." instead of "a bases that. . . in binding . . . agreement or . . ."

TR. 87, 1. 9 "concede. . ." instead of "could see. . ."
TR. 115, 1. 4 "demurred. . ." instead of "demerged . . ."

JD—(ATL)—62—83
Orlando, FL

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
ATLANTA, GEORGIA

Case 12-CA-8705
12-CA-9788

CITY CAB COMPANY OF ORLANDO, INC.
YELLOW CAB COMPANY OF ORLANDO, INC.
d/b/a YELLOW CAB COMPANY and
DIXIE CAB COMPANY

and

YELLOW, CITY, DIXIE INDEPENDENT CAB
DRIVERS ASSOCIATION

ERRATUM

Undersigned's Decision, which issued on August 26, 1983, is hereby corrected as follows:

1. On Page 7 in line 7, substitute the word "fees" for the word "fee."

2. On Page 10 in line 9, insert the word "in September" between the words " 'ruling' " and " 'in' "; and, in line 10, strike the word "September."

3. On Page 15 in line 16, add a period and a closing quotation mark after the word "gesture."

4. On page 16 in line 11, substitute the word "accordance" for the word "according."

/s/ Howard I. Grossman
HOWARD I. GROSSMAN
Administrative Law Judge

Dated at Washington, DC September 13, 1983.

Supreme Court, U.S.
FILED
SEP 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2136

In the Supreme Court of the United States

OCTOBER TERM, 1986

CITY CAB COMPANY OF ORLANDO, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Washington, D.C. 20570

QUESTION PRESENTED

Whether the six-months statute of limitations in Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), precludes the Board from proceeding against post-settlement unfair labor practices which occurred more than six months prior to the filing of an unfair labor practice charge where the settlement was properly set aside for non-fulfillment of its purposes.

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Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

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§ 8(a)(5), 29 U.S.C. 158(a)(5) 2, 4, 5

§ 10(b), 29 U.S.C. 160(b) 4, 5, 6, 9

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is not yet reported. The decision and order of the National Labor Relations Board (Pet. App. 19a-50a) is reported at 273 N.L.R.B. 1344.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1986. The petition for a writ of certiorari was filed on June 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1978, the National Labor Relations Board (the Board) certified Yellow, City, Dixie Independent Cab Drivers Association (the Union) as the representative of

petitioners' drivers. The parties entered into an interim collective bargaining agreement in March 1978. Pet. App. 23a. In November 1978, after the District of Columbia Circuit ruled that taxicab drivers in Chicago were independent contractors excluded from the coverage of the Act,[1] petitioners withdrew their recognition of the Union (*ibid.*). Thereafter, the Board found that petitioners violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union respecting the Orlando drivers. 242 N.L.R.B. 94 (1979). Petitioners filed a petition for review of the Board's decision in the United States Court of Appeals for the District of Columbia Circuit.

On July 3, 1979, two months after the Board's refusal-to-bargain decision and while the petition for review was pending, the Union filed a charge alleging that petitioners had made unlawful unilateral changes in the drivers' wages and working conditions by increasing petitioners' charges to the drivers for leasing cabs and making certain other changes in bidding procedures. Pet. App. 24a (Board Case No. 12-CA-8705). On July 25, 1979, the Regional Director issued a complaint alleging that petitioners had violated their bargaining obligation under the Act by making unilateral changes in conditions of employment. In August 1979, the parties entered into a written agreement settling the unfair labor practice complaint with the approval of the Board's Regional Director. In the settlement agreement, petitioners agreed not to make unilateral changes in employment, to bargain with the Union upon request, and to "make whole" any employees who incurred monetary losses due to petitioners' unilateral changes. Pet. App. 24a-25a; GCX 3(a) and (b).[2] The settlement agreement contained a stipulation

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[1] *Local 777, Democratic Union Organizing Comm.* v. *NLRB*, 603 F.2d 862 (D.C. Cir. 1978).

[2] "GCX" references are to the General Counsel's exhibits at the unfair labor practice hearing.

recognizing that the issue of whether the drivers were employees or independent contractors was pending in the District of Columbia Circuit. It provided that the settlement would be null and void if the Board's position on this issue were rejected by the District of Columbia Circuit, but that if the Board's position were ultimately upheld by the federal courts, petitioners would thereupon immediately abide by and give effect to the settlement agreement (Pet. App. 25a; GCX 3(e)).

On July 30, 1980, the District of Columbia Circuit upheld the Board's assertion of jurisdiction over petitioners' drivers and enforced the Board's bargaining order against petitioners. 628 F.2d 261. After petitioners' petition for rehearing was denied in September, petitioners, without notifying the Union, made changes in the daily rental rate and mileage surcharge in October and December 1980, and in January 1981 (Pet. App. 31a-32a).

The parties resumed bargaining in January 1981 (Pet. App. 26a). In July, while negotiations continued, petitioners unilaterally reinstituted a daily mileage surcharge of 20 cents per mile over 170 miles. The Union then filed a charge in Board Case No. 12-CA-9788 alleging that petitioners had violated their duty to bargain by making this unilateral change. Pet. App. 31a.

Meanwhile, after the District of Columbia Circuit's decision in July 1980, the Board's regional office attempted to get petitioners to comply with the "make whole" provision of the settlement agreement (Pet. App. 27a-29a). These efforts were unsuccessful. Accordingly, by letter dated August 26, 1982, the Regional Director set aside the settlement agreement because it had "failed in its purpose and because of allegations of post-settlement violations of the Act" (Pet. App. 32a). Thereafter, in September 1982, the

Director consolidated Board Cases Nos. 12-CA-8705 and 12-CA-9788, and issued a complaint alleging that petitioners had violated the Act by their unilateral changes in wages and working conditions before as well as after the settlement agreement.

2. Agreeing with the administrative law judge, the Board found that the Regional Director had properly set aside the settlement agreement. Again in agreement with the administrative law judge, the Board found that petitioners violated Section 8(a)(5) and (1) of the Act, by unilaterally changing the terms and conditions of their employees' employment on various occasions from 1979 through 1981, without notice to the Union or an opportunity for the Union to bargain concerning those changes. Pet. App. 20a, 33a, 35a, 40a. In finding that the settlement agreement had been properly set aside, the Board found the petitioners' post-settlement unilateral actions violated the promises of its settlement agreement, and, given the parties' inability to agree on the amount of the petitioners' liability for back pay, the settlement had failed in its purpose to compensate the drivers for lost income (*id.* at 33a, 40a). The Board also rejected petitioners' contention that Section 10(b) of the Act, 29 U.S.C. 160(b), precluded the Board from processing the unfair labor practice charges involving the unilateral changes in late 1979 and 1980 because the Union did not file a new charge until July 1981, more than 6 months after the conduct occurred. The administrative law judge and the Board found that proceeding on both of the Union's charges was proper because the settlement had been properly set aside (Pet. App. 20a n.3, 40a).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 18a). The court found that petitioners' unilateral changes in rental rates and other terms of employment constituted unlawful conduct within

the meaning of Section 8(a)(5) of the Act, and the court rejected petitioners' contention that they were not required to bargain about those changes because they were a continuation of established past practice (Pet. App. 6a-9a).

The court also rejected petitioners' assertion that the settlement agreement was not properly set aside. The court noted that the Board had relied upon two independent grounds in setting aside the agreement: that the agreement had failed to achieve its purpose, and that petitioners had committed post-settlement violations of the Act. Pet. App. 10a. Finding the former ground sufficient to justify setting aside the settlement agreement, the court found it unnecessary to consider whether the settlement agreement was properly set aside based on the latter ground as well (*id.* at 13a).[3]

Finally, the court rejected petitioners' argument that, even assuming the settlement agreement had been properly set aside, most of the post-settlement violations in the consolidated complaint were time-barred by Section 10(b) of the Act (Pet. App. 13a). Citing *NLRB* v. *Fant Milling Co.*, 360 U.S. 301, 309 (1959), the court explained that Section 10(b) does not preclude the Board from "deal[ing] with subsequent conduct under a previous charge if the conduct is 'related to' the unfair labor practices alleged in the charge and 'grow[s] out of' them while the proceeding is pending before the Board" (Pet. App. 15a-16a). The court pointed out that here "the Union filed a timely charge as to the initial round of unilateral changes. The charges were of precisely the same class of violations as was prescribed in the original complaint. Accordingly, had the settlement not intervened,

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[3]Thus, the court noted, but did not reach, petitioners' argument that settlements may not be set aside based on "post-settlement violations which are not the subject of charges filed within six months of the violations" (Pet. App. 13a).

and if the Regional Director's investigation had brought to light the 1980 and 1981 violations, *Fant Milling* authorized the Board to issue a complaint consolidating the entire series of unfair labor practices without the necessity of another charge and without regard to the interval between the issuance of the complaint and the violation dates" (Pet. App. 16a-17a). Once the settlement agreement was set aside, the case was in exactly that posture[4] (*id.* at 17a-18a).

ARGUMENT

Petitioners do not challenge the Board's findings, upheld by the court of appeals, that (1) petitioners unlawfully unilaterally changed the terms and conditions of employment of their drivers both before and after the settlement agreement, and (2) the settlement agreement was properly set aside because it had failed in its purpose to compensate the drivers for petitioners' pre-settlement unlawful conduct. Petitioners contend only that most of the findings of unlawful post-settlement conduct were time-barred by Section 10(b) of the Act, 29 U.S.C. 160(b). There is no merit to that contention, and it does not warrant review by this Court.

Section 10(b) of the Act provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge." Here, the Union's charge in Board Case No. 12-CA-8705 was filed on July 3, 1979, two months after petitioners' initial round of unilateral changes in May 1979. The Union's next charge, in Board Case No. 12-CA-9788, was filed on July 20, 1981, one week after petitioners reinstated an excess mileage surcharge on July 13. Since this

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[4]The court rejected, as unsupported by the facts, petitioners' assertion that the Board's " 'post-hoc reliance' " on *Fant Milling* was impermissible. The court found that the Board's rejection of petitioners' Section 10(b) argument accurately stated the law as enunciated by *Fant Milling* (Pet. App. 17a n.8).

charge was filed almost two years after the unilateral changes in late 1979, and almost a year after the unilateral changes in late 1980, petitioners contend that Section 10(b) precludes the Board from alleging or finding that the 1979 and 1980 conduct was in violation of the Act.

However, the "limitation [in Section 10(b)] extinguishes liability for unfair labor practices committed more than six months prior to the filing of a charge. It does not relate to conduct subsequent to the filing of the charge." *NLRB* v. *Fant Milling Co.*, 360 U.S. at 309 n.9. Once a timely unfair labor practice charge has been filed, the Board "is not precluded from 'dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.' " *Id.* at 309 (quoting *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 359 (1940)). Accordingly, the courts of appeals have uniformly held that where a timely charge has been filed concerning alleged unlawful conduct and the Regional Director's investigation has brought to light other similar alleged violations, the Director is authorized to issue a complaint consolidating the entire series of unfair labor practices without the necessity of another charge and without regard to the interval between the issuance of the complaint and the violation dates. *NLRB* v. *Complas Industries, Inc.*, 714 F.2d 729, 732-733 (7th Cir. 1983); *Eastern Maine Medical Center* v. *NLRB*, 658 F.2d 1, 6-7 (1st Cir. 1981); *NLRB* v. *Jack La Lanne Management Corp.*, 539 F.2d 292, 295 & n.1 (2d Cir. 1976); *NLRB* v. *Rex Disposables*, 494 F.2d 588, 590 (5th Cir. 1974); *NLRB* v. *International Union of Operating Engineers*, 460 F.2d 589, 600-601 (5th Cir. 1972). Here, the Union filed a timely charge as to petitioners' initial unilateral changes, and petitioners do not dispute that the subsequent unilateral changes were "related to those alleged in the [initial]

charge."[5] Thus, had the settlement not intervened, the Regional Director could have amended the initial complaint to allege the entire series of unfair labor practices without the necessity of filing another charge, and subsequent charges could have been consolidated with those in the initial complaint irrespective of the violation dates.

Petitioners assert (Pet. 13) that *Fant Milling* is inapplicable in "settlement cases" because "[c]harges resolved by settlement agreement are no longer 'pending before the Board.' Settlement agreements create the expectation that all outstanding disputes have been resolved." The principles enunciated in *Fant Milling*, however, fit comfortably in the settlement context.

After a timely charge results in the issuance of a complaint, the settlement agreement brings to a halt for a time the Board's investigatory process. Once the settlement is properly set aside, however, the Regional Director recovers his full prosecutorial authority to prosecute both pre-settlement and post-settlement violations. See *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 254-255 (1944); cf. *Fant Milling*, 360 U.S. at 302-303 (dismissal of charge withdrawn after subsequent unfair labor practices brought to Regional Director's attention). Therefore, the Regional Director properly consolidated within the amended complaint all the post-settlement violations. See *Globe Gear Co.*, 189 N.L.R.B. 422 (1971), enforced, 451 F.2d 1348 (6th Cir. 1971) (Regional Director properly set aside settlement agreement upon

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[5]Petitioners erroneously assert (Pet. 11-12) that the Court's admonition in *Fant Milling* (360 U.S. at 309) that the Board does not have "carte blanche" authority to expand a charge supports their position. The Court's admonition warned against reaching conduct that is not "related to" and does not "grow out of" the prior conduct; that is not an issue in this case.

information that employer had breached its promise to supply economic data to the union, even though the union had not filed a new unfair labor practice charge).

This result does not contravene the policy of Section 10(b) of the Act, which is to give respondents prompt notice of possible liability so that they may prepare their defense before " 'records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.' " *Local Lodge No. 1424* v. *NLRB*, 362 U.S. 411, 419 (1960) (citation omitted). The Union's initial July 3, 1979, charge gave petitioners timely notice that the Union was challenging their unilateral changes. Although the resulting complaint proceeding was "continued without date" by virtue of the settlement agreement (GCX 3(e)), petitioners were on notice that the Regional Director would treat any repetition of their unilateral conduct as an additional violation of the Act. There was no need for the Union to file charges every six months in order to apprise petitioners that they might be called to account for their new unfair labor practices.

Inyo Lumber Co., 98 N.L.R.B. 984, 986 (1952), on which petitioners rely (Pet. 14-15), does not dictate a contrary result. The settlement agreement there was set aside because of the employer's post-settlement unfair labor practices. The Board dismissed the complaint because the union filed its post-settlement charge more than nine months after commission of the unlawful conduct. The Board explained that while Section 10(b) would not preclude it from proceeding in those circumstances, a policy prohibiting a charging party from overturning a settlement on the basis of unjustifiably delayed charges about post-settlement unfair labor practices may serve to reassure charged parties that they may engage in settlements without the risk of having them overturned on the basis of stale claims. *Inyo*, 98 N.L.R.B. at 985-986 & n.3. This is not a case where the

wrongdoer has fully performed its promises to cease and desist from—and to make amends for—its original misconduct. Rather, apart from any further charges by the Union, the Regional Director was entitled to set aside the settlement because, due to the company's failure to compensate the drivers for its pre-settlement unlawful conduct, the settlement failed to accomplish its purpose and to effectuate the policies of the Act.[6] Accordingly, here there was no issue of the settlement having been set aside because of stale claims.[7]

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[6]As noted above (page 5 note 3), the court of appeals found that the settlement was properly set aside because its purposes were not effectuated, and did not decide whether the settlement could have been set aside simply because of the subsequent unfair labor practices.

[7]There is no merit to petitioners' additional assertion (Pet. 9-11) that the court of appeals improperly ruled on the Section 10(b) issue here in the absence of a Board determination thereon. The Board rejected petitioners' Section 10(b) argument because it found that the settlement was properly set aside. The court of appeals agreed, relying on *Fant Milling* as authority. The fact that the Board did not cite *Fant Milling* is immaterial; the Board's decision properly applied the principles enunciated therein. See *Borek Motor Sales, Inc.* v. *NLRB*, 425 F.2d 677, 681 (7th Cir.), cert. denied, 400 U.S. 823 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
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National Labor Relations Board

SEPTEMBER 1986

DOJ-1986-09